REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00477

In the matter between:

CYRIL GEORGE KITCHING	**1ST APPLICANT**
ELIZABETH HESTER KITCHING	**2ND APPLICANT**

and

THE CHAIRPERSON OF THE IMMIGRATION SELECTION BOARD	**1ST RESPONDENT**
THE CHIEF OF IMMIGRATION	**2ND RESPONDENT**
THE MINISTER OF HOME AFFAIRS, IMMIGRATION, SAFETY AND SECURITY	**3RD RESPONDENT**

Neutral citation: *Kitching v The Chairperson of the Immigration Selection Board* (HC-MD-CIV-MOT-REV-2021/00477) [2023] NAHCMD 36 (7 February 2023)

Coram: PRINSLOO J

Heard: **16 September 2022**

Delivered: **7 February 2023**

Flynote: Administrative Law – Review Application – Application for permanent residence permit – Section 26(3) – Board did not exercise its discretion properly.

Summary: In July 2020, the applicants submitted their application for permanent residence permits supported by the relevant forms and supporting documentation. However, in January 2021, the applicants were informed via a letter drafted by the first respondent that their application was rejected. The reason advanced was 's 26(3)(*d*), insufficient means of sustenance.'

The applicants launched the current application in November 2021, challenging the reasons for the rejection.

Held that the court is of the considered view that the applicant should have been given the opportunity to make representations regarding this conclusion before the final decision was made.

Held that it is trite that the Board should exercise its discretion in reaching a decision in a matter of this nature. However, in exercising its discretion, the Board must act fairly and reasonably and comply with requirements imposed in terms of Article 18 of the Namibian Constitution. In the current instance, the Board did not arrive at its decision fairly and reasonably.

Held further that the Board did not exercise its discretion properly when it failed to consider several facts before making its final decision.

ORDER

---

1. The decision refusing the applicants' application for permanent residence permit is reviewed and set aside.

2. The respondents are directed to take the necessary step to ensure that the Immigration Selection Board reconsider the applicants' application for a permanent residence permit in a lawful and procedurally fair manner within 30 days from date of this order.
3. The respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

JUDGMENT

PRINSLOO J

Introduction

[1] The matter came before me as a review seeking an order to review and set aside a decision of the Immigration Selection Board, rejecting the applicants' application for permanent residence permits.

[2] The applicants are married and are South African citizens. They launched an application for permanent residence permits in their names and on behalf of their three minor children.

[3] The applicants seek the following relief:

> 'a) Review and set aside the decision of the Immigration Selection Board in refusing to authorise a permanent residence permit to the applicants, and set aside the said decision as being unconstitutional, invalid and of no force or effect.
> b) Ordering the Immigration Selection Board to reconsider the applicants' application for a permanent residence permit within 30 days of an order in terms hereof.
> c) Ordering the respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
> d) Further and or alternative relief.'

<u>Background</u>

[4] The background facts are, to a large extent, common cause, and I will briefly summarize the facts that gave rise to the current application.

[5] The first applicant is the General Manager: Building of Nexus Group Holdings (Pty), a wholly owned Namibian company, involved in the construction business. The first applicant has been so employed since 2015.

[6] The first applicant has been employed based on employment permits, which have been renewed regularly. The current employment permit expires on 4 October 2023.

[7] In July 2020, the applicants submitted their application for permanent residence permits supported by the relevant forms and supporting documentation. However, in January 2021, the applicants were informed via a letter drafted by the first respondent that their application was rejected. The reason advanced was 'sec 26(3)(*d*), insufficient means of sustenance.'

[8] The applicants appealed to the second respondent, the Immigration Selection Board, to reconsider the application. On 17 August 2021, the first respondent responded, in writing, to the appeal filed by the applicants, informing them that:

> 'Your PRP application is rejected, the Board maintains its previous decision that stated that, applicant does not meet the requirements of Section 26(3)(d) of the Immigration Control Act 1993, in that applicant has no sufficient means of sustenance.'

[9] The applicants launched the current application in November 2021, challenging the reasons for the rejection.

The nature and basis of the respective claims and defences

[10] The basis of the applicants' application is that they should have been issued permanent residence permits on the basis that the first applicant met the requirements set out in s 26(3)(*a*) to (*e*) of the Act.

[11] The respondents' defence is that the Immigration Selection Board was entitled to reject the applications for permanent residence because the applicants have not met the requirement that the applicants have sufficient means of sustenance.

The founding papers

[12] The first applicant limited his founding papers to the facts pertaining to s 26(3)(*d*) of the Act and the proper interpretation of the provision described above.

[13] It is the case of the first applicant that as a General Manager of a large construction firm, he earns an above-average income, which at the time of the application for the permanent residence permits, amounted to N$1 608 616,20 per year. Therefore, according to the first applicant, his income is more than sufficient to sustain him and his family.

[14] The first applicant states that as supporting documents to the application for permanent residence, he provided the Immigration Selection Board with his audited statement of assets and liabilities as of 30 May 2020. At the time, his assets were valued at N$8 233 197, and his liabilities were N$4 203 457.

[15] As part of his assets, the first applicant has an investment in the form of a retirement annuity in the amount of N$1 576 639 and a pension fund of N$306 418. In addition, he and his spouse own two immovable properties in South Africa with a combined value of more than N$5 000 000. At the time of his application, the outstanding bond over the two properties was N$2 199 000. According to the first

applicant, he can service the bond over and above, covering his family's expenses with his regular salary.

[16] The first applicant states that he provided his bank statements for the months of April to June 2020 in support of the application and that although all the closing balances were positive, the balances for April and May 2020 were smaller as a result of a reduction in salary due to the impact of Covid-19 on his employer's revenue. However, despite the effect of Covid-19 on his salary, he was still able to sustain his family and himself.

[17] On 17 August 2021, the applicants received a letter from the Chairperson of the Immigration Selection Board again informing them that their permanent residence permit was rejected and again advanced the reason for the decision as 'applicant does not meet the requirements of s 26(3)(*d*) of the Immigration Control Act 1993, in that the applicant has no sufficient means of sustenance'.

[18] The applicant further raised the issue of a memorandum that was issued to inform the Board that the applicants do not own immovable property. The first applicant submitted that this contention needs to be corrected as he owns two immovable properties in South Africa for which he earns a monthly rental income over and above his regular salary. The applicant submits that the Immigration Selection Board should have considered the rental income, and failure to do so amounts to an irregularity.

[19] The first applicant contends that all the requirements set out in s 26(3)(*d*) of the Act were complied with, yet the Immigration Selection Board failed to consider same. As a result, the applicants pray for the relief in the Notice of Motion.

<u>Opposing papers</u>

[20] In reply, Mr Ettiene Maritz, the Executive Director of the Ministry of Home Affairs, Immigration, Safety and Security and the appointed Chairperson of the Immigration Selection Board deposing to the answering affidavit, states as follows in summary:

a) The first applicant failed to prove and satisfy the Immigration Selection Board that he fulfilled the requirements under s 26(3) of the Act.
b) The Board must be satisfied on the papers before it that the applicant can maintain and sustain himself and his family to succeed in an application for a permanent residence permit.
c) The Board considered the applicants' financial statements and exercised its discretion on the documents provided. If the applicant wanted the Board to consider properties owned outside of Namibia as a source of income it should have been indicated.
d) The applicants should have indicated to the Board that they are willing to sell or lease the property they own outside the country to supplement their income in Namibia. The Board could thus only consider a source of income that is known to it.
e) It is conceded that the email expressed his dissatisfaction with the Board's decision. Still, the first applicant fails to mention that he was advised in writing that in terms of s 26(7) of the Act, he could submit new information within six months to enable the Board to reconsider its decision.
f) The first applicant was informed of the remedies available to him at the time.
g) There is no unfairness, unreasonableness or bad faith in the conduct of the Board. The deponent denies that the Board disregarded any of the documents as averred by the applicants and submits that the applicants did not make out a case upon which the court can grant the relief sought.

Arguments advanced

On behalf of the Applicants

[21] Mr Tjombe confined his arguments to the issues pertaining to s 26(3)(*d*) of the Act and the interpretation of the aforementioned provision.

[22] Mr Tjombe argued that if the first applicant's qualifications and financial position were set out in the documents submitted supporting the permanent residence permit application, the facts so deposed to by the first applicant are not in dispute. Consequently, Mr Tjombe argues that the decision of the respondents was irrational.

[23] Mr Tjombe argues that it appears that the Board considered the opening and closing balances of the bank statements submitted but argued that the bank balances for the months of April and May 2020 were mid-Covid. Namibia was in hard lock-down, and the relatively small positive balances in the account of the first applicant can be explained due to the reduction in salary. However, so counsel argued, despite the reduced income and financial constraints, the balance remained positive even after the first applicant provided for his family's needs. The balance at the end of June 2020 amounted to N$57,492.66. Mr Tjombe submitted that it could not be argued that the first applicant cannot sustain his family if one has regard to the significant positive balance in the account of the first applicant.

[24] Mr Tjombe further submits that the immovable properties of the applicants were not considered by the Board, even though the properties remain the applicants' most significant asset. Mr Tjombe submits that failing to consider this asset base was a patently incorrect exercise of discretion.

[25] Mr Tjombe submits that the applicants approached the Board requesting an audience, and by not granting the applicants that opportunity to deal with the apparent requirement of the ownership of immovable property in South Africa, violated the applicants' right to the audi and therefore, their rights to fair hearing offending reasonable administrative action as contemplated in Article 18 of the Constitution.

[26] Mr Tjombe contends that s 26(3)(*d*) of the Act consists of three further requirements, which must be read disjunctively. In his view, satisfying one of these sub-requirements would suffice. However, it appears that the Immigration Selection Board considered only one of these requirements. Once a decision was taken on the issue of sustenance, the Board should have considered the remainder of the requirements that were complied with. The remaining requirements that were not considered are:

a. the first applicant earns an above-average salary as a General Manager for a large construction company. His profession as a project manager is in demand, and thus there will always be work for him.
b. the first applicant has the qualifications, education, training and experience that are likely to render that applicant efficient in the profession, occupation or employment. The first applicant has been employed for over 20 years in his profession, and it has rendered him efficient in his profession.

On behalf of the respondents

[27] Ms Meyer takes no issue with Mr Tjombe's interpretation of s 23(3)(*d*) of the Act. However, she submits that regardless of the provisions of s 26(3)(*d*) the Board still retains the discretion to reject the applicants' application and that the Board is not bound to 'rubber stamp' all the applications that seemingly meet all the requirements of s 26 of the Act and in the process do away with the consideration of other factors such a socio-economic and national security dynamics.

[28] Ms Meyer concedes that the Board had a duty to exercise its discretion judiciously but contends that it did precisely that. Ms Meyer emphasises that the Board is not limited to only looking at the financial aspects but may consider outside factors. Ms Meyer submitted that the applicants still own property in South Africa, which indicates that they have no intention of making Namibia their permanent home.

[29] Ms Meyer contends that the Board is not necessarily duty-bound to consider properties outside the borders of Namibia, but rather the properties within Namibia.

[30] Ms Meyer referred the court to *Laubscher v Chairperson of the Immigration Selection Board,*[1] wherein it was held that courts do not and must not lightly assume the powers of the functionary concerned. In the current instance, the functionary is the Immigration Selection Board. Ms Meyer submits that the applicants failed to make out a case as to why the court should assume the power of the Board.

<u>Issue for determination</u>

[31] Whether or not the Board applied their mind to the applicants' application for the permanent residence permit, particularly if the applicants' financial information was adequately considered.

[32] Whether the Board was entitled to reject the applicants' application for permanent residence permits on the basis of 'insufficient means of sustenance' whilst not factoring in the further requirements contained in s 26(3)(*d*) of the Act.

<u>Applicable legal principles and discussion</u>

[33] Section 26 of the Immigration Control Act provides for applications for permanent residence permits. Section 26(3) provides as follows:

> '(3) The board may authorize the issue of a permit to enter and to be in Namibia for the purpose of permanent residence therein to the applicant and make the authorization subject to any condition the board may deem appropriate: Provided that the board shall not authorize the issue of such a permit unless the applicant satisfies the board that-
>
> (a) he or she is of good character; and

[1] *Laubscher v Chairperson of the Immigration Selection Board* (HC-MD-CIV-MOT-REV-2020/00285) [2021] NAHCMD 502 (28 October 2021) at para 63.

(b) he or she will within a reasonable time after entry into Namibia assimilate with the inhabitants of Namibia and be a desirable inhabitant of Namibia; and

(c) he or she is not likely to be harmful to the welfare of Namibia; and

(d) he or she has sufficient means or is likely to earn sufficient means to maintain himself or herself and his or her spouse and dependent children (if any), or he or she has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation he or she intends to pursue in Namibia; and

(e) he or she does not and is not likely to pursue any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia; and

(f) the issue to him or her of a permanent residence permit would not be in conflict with the other provisions of this Act or any other law; or

(g) he or she is the spouse or dependent child, or a destitute, aged or infirm parent of a person permanently resident in Namibia who is able and undertakes in writing to maintain him or her'.

[34] The parties agree that the only requirement in issue is the one set out in s 26(3)(*d*) of the Act. That being said, I must hasten to add that the issue does not relate to the whole of s 26(3)(*d*) as the particular sub-section can be divided into three further requirements that must be complied with. These additional requirements are:

a) the applicant has sufficient means to maintain himself or herself and his or her spouse and dependent children (if any); <u>or</u>
b) the applicant is likely to earn sufficient means to maintain himself or herself and his or her spouse and dependent children (if any); <u>or</u>
c) the applicant has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation he or she intends to pursue in Namibia

[35] This court will consider the wording of the section within the general rule of construction. In that case, the words of a statute must be given their ordinary, literal or grammatical meaning. If by so doing, it is ascertained that the words are clear and

unambiguous, then the effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it will be permissible for a court of law to depart from such a literal construction, for example, where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent[2].

[36] It is clear from reading the sub-section that the requirement operates disjunctive from each other because of the operative word or. I agree with Mr Tjombe that the sub-section does not require an applicant to comply with all three requirements as it is read in the alternative. Yet the Board solely regarded the first requirement necessitating the applicant to have sufficient means to maintain himself, his spouse (if any), and children.

Insufficient means of sustenance

[37] The applicants submitted audited statements setting out their financial position. The applicants further submitted their bank statements for the period of three months (April – June 2020) in support of their application. It appears that the Board regarded the starting balance and closing balance in respect of the three months in question and drew an inference in respect of the income to the disposal of the applicants.

[38] It is common cause that the applicant earns a salary well above the average salary (N$1 608 616,20 per year at the time), and the closing balance in his bank statement for June 2020 amounted to approximately N$57 000. It should be noted that amid the Covid-19 pandemic, the first applicant had to contend with the reduction in income because of it.

[39] The Board was of the view, despite this information available to it, that the first applicant did not have sufficient means of sustenance, yet there is no guide as to what income amount would satisfy the requirement of the Act.

[2] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (1) (APPEAL 432 of 2009) [2009] NAHC 94 (24 December 2009) at para 7.

[40] In *Viljoen v Chairperson of the Immigration Selection Board*[3] where the court was faced with a similar situation, Parker J stated as follows:

'[27] …The Board expected applicant to have presented information which, in my view though, would at best be speculative and at worse worthless. What kind of information – true information – can any human being produce to indicate truly what amount of money would be sufficient to maintain another human being over a period of time. Forget about predictions by economists about such matters. Their predictions are mere theorizing and suppositions: they are *ex ante* essentially. Even if, for arguments sake, what the Board sought was not speculative and worthless information. What could have prevented the Board to give a hearing to (Mr and Mrs Bosho) and request them to produce within a time limit proof of their earnings? This is what any reasonable administrative body which is minded to act fairly and reasonably and minded to apply its mind to the question at hand would do. On this score the Board did not act reasonably.'

[41] The financial position of the applicants served before the Board and the facts relating to their financial situation stand unchallenged. It is therefore difficult to understand on what basis the Board made the finding that the first applicant did not have a sufficient means of sustenance.

Immovable property

[42] Apart from the disposable income earned every month, the applicants are also owners of immovable property. Instead of considering that the applicants have immovable property in their favour, it would appear that it counted against the applicants. Ms Meyer advanced an argument that as the applicants still own property in their native country of South Africa, it indicates that the applicants have no intention of making Namibia their permanent home. There are absolutely no merits in the argument advanced.

[3] *Viljoen v Chairperson of the Immigration Selection Board* (A 149/2015) [2017] NAHCMD 13 (26 January 2017).

[43] Ms Meyer further advanced an argument that the Board is not necessarily duty-bound to consider (as part of the financial proprietary of the Applicants) properties outside of the borders of Namibia, but rather properties owned within the country. In the respondents' answering affidavit the respondents state as follows:

'Properties owned by the applicants outside Namibia are not considered unless the applicants, in their application for permanent residence, rely on those properties as an income stream…The applicants did not indicate to the Board that they are willing to sell or lease the properties they own outside so as to supplement their income in Namibia[4].'

[44] If this is so, the question that begs an answer is whether such information is in the applicants' knowledge and whether it could reasonably be expected from the applicants to have known?

[45] The Board clearly based its conclusion on unmentioned facts or assumptions which are based on the knowledge gained by its members over time and by virtue of their work. In my view, it would be incumbent on the Board to inform the applicants of such facts, assumptions and knowledge to afford them the opportunity to respond to it[5].

[46] In the minority judgment of *Chairperson of the Immigration Selection Board v Frank* Strydom, CJ stated:

'In the context of the Act, the process for the application of a permit was set in motion by the submission of a written application by the first respondent. If on such information before it, the application is not granted, and provided the Board acted reasonably, that would be the end of the matter. However, there may well be instances where the Board acts on information they are privy to or information given to them by the Chief of Immigration (see sec. 26(2)). If such information is potentially prejudicial to an applicant, it must be communicated to him or her in order to enable such person to deal therewith and to rebut it if possible. (See Loxton v

[4] Paragraph 25 of the respondents' answering affidavit.
[5] *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC) at 175F-176A.

Kendhardt Liquor Licensing Board, 1942 AD 275 and Administrator SWA v Jooste Lithicum Myne (Edms) Bpk, 1955(1) SA 557(A). However, where an applicant should reasonably have foreseen that prejudicial information or facts would reach the appellant, he or she is duty bound to disclose such information. (See Wiechers op. cit. P. 212.)'

[47] In the majority judgment, O'Lynn AJA stated as follows:

'The principles of administrative justice requires that in circumstances such as the present, the Board should have disclosed such facts, principles and policies to the applicants for the resident permit and allowed an opportunity, to respond thereto by letter or personal appearance before the Board or both. This the Board had failed to do'.

[48] I am of the considered view that the applicant should have been given the opportunity to make representations regarding their financial position and immovable before the final decision was made.

<u>Conclusion</u>

[49] It is trite that the Board should exercise its discretion in reaching a decision in a matter of this nature. However, in exercising its discretion, the Board must act fairly and reasonably and comply with requirements imposed in terms of Article 18 of the Namibian Constitution. In the current instance, the Board did not arrive at its decision fairly and reasonably.

[50] The Board did not exercise its discretion properly when it failed to consider several facts before making its final decision.

[51] These facts include the uncontradicted evidence of the financial position of the first applicant, the immovable properties at his disposal, the income generated from the said properties and the remainder of the requirements of s 26(3)(*d*) of the Act.

[52] My order is therefore as follows:

1. The decision refusing the applicants’ application for permanent residence permit is reviewed and set aside.
2. The respondents are directed to take the necessary step to ensure that the Immigration Selection Board reconsider the applicants' application for a permanent residence permit in a lawful and procedurally fair manner within 30 days from date of this order.
3. The respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

JS Prinsloo
Judge

APPEARRANCES

FIRST and SECOND APPLICANT:	N Tjombe Of Tjombe-Elago Inc., Windhoek
FIRST to THIRD RESPONDENTS:	M Meyer Government – Office of the Government Attorney, Windhoek